

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of)	
)	
DELTA RADIO, INC.)	File No. BPH-19950417ME
)	Facility ID No. 16553
For a Construction Permit for a New FM Station)	
at Greenville, Mississippi)	

MEMORANDUM OPINION AND ORDER

Adopted: August 7, 2003

Released: August 20, 2003

By the Commission:

1. Before us is Delta Radio, Inc.'s ("Delta") September 26, 2002, Application for Review of the Media Bureau's ("Bureau") August 27, 2002, letter decision ("Staff Decision").¹ In the Staff Decision, the Bureau dismissed Delta's application for a new FM broadcast station at Greenville, Mississippi, based upon Delta's default of its final auction payment. For the reasons discussed below, we deny the Application for Review.² We also deny Delta's November 1, 2002, Petition for Reconsideration of the Bureau's October 2, 2002, letter setting forth the amount of Delta's default payment ("October Letter").³ Finally, we dismiss as moot Mondy-Burke Broadcasting Network's ("MBN") June 16, 2000, Application for Review of the staff's denial of an MBN petition to deny the Delta application.

2. **Background.** In October 1999, Delta placed the winning bid for an FM broadcast station construction permit at Greenville, Mississippi, in mutually exclusive ("MX") Group FM 73 of Closed Broadcast Auction No. 25.⁴ MBN, the second-highest bidder in MX Group FM 73, timely filed a petition to deny Delta's application. That petition was denied by letter dated May 17, 2000.⁵ MBN filed an Application for Review on June 16, 2000.

¹ *Letter to Mr. Larry G. Fuss, Barry D. Wood, Esq., and Mondy-Burke Broadcasting Network*, 17 FCC Rcd 16324 (MB 2002).

² Mondy-Burke Broadcasting Network ("MBN"), the second-highest bidder to Delta for the Greenville construction permit, filed an Opposition to Delta's Application for Review on October 4, 2002. Delta filed a Reply on October 24, 2002. Additionally, the Minority Media and Telecommunications Council ("MMTC") filed Comments as *amicus curiae* on October 10, 2002 ("MMTC Comments"), with MBN filing a Response to the MMTC Comments on October 18, 2002. The MMTC Comments are discussed beginning at paragraph 18 of the text.

³ *Letter to Mr. Larry G. Fuss and Barry D. Wood, Esq.*, 17 FCC Rcd 19029 (MB 2002). The Petition for Reconsideration was referred to the Commission by the Chief, Media Bureau, under 47 C.F.R. § 1.106(a)(1), because it is based upon the allegations in Delta's Application for Review.

⁴ *Public Notice*, "Closed Broadcast Auction No. 25 Closes; 91 Winning Bidders in the Auction of 118 Broadcast Construction Permits," 14 FCC Rcd 17186, 17197 (MMB/WTB 1999).

⁵ *Letter to Mr. Alfred L. Roberson III, Lauren A. Colby, Esq., and Mr. Larry G. Fuss*, Ref. No. 1800B3-ALB (MMB May 17, 2000).

3. On February 25, 2002, while MBN's Application for Review was pending, the Commission released its decision in *Abundant Life, Inc.*⁶ In *Abundant Life III*, we ordered the Bureau to place winning auction bidders on "ready to grant" public notices "promptly after dismissing or denying petitions to deny."⁷ "Ready to grant" public notices set forth deadlines for the winning bidders' final auction payments under Sections 1.2109, 73.5003, and 73.5006(d) of our Rules.⁸ Accordingly, the Bureau released a Public Notice stating that Delta's application, and those of two other winning bidders, were ready for grant upon timely payment of the balance of their winning bids placed in Auction No. 25.⁹ Delta's final payment was due by March 21, 2002, with late payment (payment of the balance plus a 5 percent late fee) due no later than April 4, 2002.¹⁰

4. Delta failed to make its final payment for the Greenville construction permit. On April 4, 2002, the late payment deadline, Delta filed a Petition for Reconsideration and Waiver, seeking a "temporary waiver" of the final payment deadline. In the Staff Decision the Bureau denied the Petition for Reconsideration and Waiver, dismissed Delta's application due to its default, and offered the Greenville construction permit to MBN as the next-highest bidder.¹¹ MBN timely deposited its 20 percent down payment on September 11, 2002. Subsequently, the Bureau assessed a default payment against Delta pursuant to Section 1.2104(g) of our Rules.¹² MBN timely made its final payment pursuant to the Bureau's Public Notice,¹³ and a construction permit for the Greenville station was issued on May 29, 2003.

6. **Discussion.** *Bureau's delegated authority to dismiss Delta application:* Delta first argues that the Bureau lacked delegated authority to deny Delta's waiver request and dismiss its application, because "the Commission has never addressed" whether the justifications for waiver advanced by Delta, taken together, constitute sufficiently unique and compelling circumstances to warrant

⁶ 17 FCC Rcd 4006 (2002) ("*Abundant Life III*").

⁷ *Abundant Life III*, 17 FCC Rcd at 4007 n.5.

⁸ 47 C.F.R. §§ 1.2109, 73.5003, 73.5006(d).

⁹ *Public Notice*, "FCC Announces It Is Prepared to Grant Broadcast Construction Permits After Final Payment Is Made," 17 FCC Rcd 4278 (MMB 2002) ("Final Payment Public Notice"). In addition to Delta, Auction No. 25 winning bidders Minnesota Christian Broadcasters, Inc. ("MCBI") (for a construction permit at Pequot Lakes, Minnesota) and North American Broadcasting Company ("NABC") (for a construction permit at Karnes City, Texas) were instructed to make their final auction payments by the same dates. Both MCBI and NABC timely paid the balance of their winning bids. *See also* 47 C.F.R. §§ 1.2109(a), 73.5003.

¹⁰ 17 FCC Rcd at 4278-79.

¹¹ In the event a winning bidder defaults, 47 C.F.R. § 1.2109(b) generally gives the Commission discretion either to reauction or to offer permits to the other bidders in descending order of their bid amounts. However, to comport with statutory requirements, in Closed Broadcast Auction No. 25 the Commission chose only to offer permits to the other bidders. *Implementation of Section 309(j) of the Communications Act-Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licenses* ("*Broadcast First Report and Order*"), 13 FCC Rcd 15920, 15952 (1998); *recon denied*, 14 FCC Rcd 8724; *modified*, 14 FCC Rcd 12541 (1999). *See also Abundant Life III*, 17 FCC Rcd at 4013-14.

¹² October Letter, *supra* note 3; 47 C.F.R. §§ 1.2104(g).

¹³ *Public Notice*, "FCC Announces It Is Prepared to Grant Broadcast Construction Permit to Mondy-Burke Broadcasting Network After Final Payment Is Made," 18 FCC Rcd 10312 (MB 2003).

an extension of the final payment deadline.¹⁴ We disagree. Shortly before the Bureau released the Staff Decision we decided the cases of *Abundant Life III* and *Winstar Broadcasting Corp.*¹⁵ In both those cases we held that a winning auction bidder that did not timely pay the balance of its winning bid is in default and its application must be dismissed, notwithstanding that appeals challenging the winning bidder's application are still pending. The Staff Decision fully accords with that precedent. We reject Delta's contention that the Bureau lacked authority to decide its waiver request because the Commission had not previously considered the exact arguments or circumstances Delta presented. For the reasons stated below, Delta's waiver request presents no "novel questions of fact, law or policy that cannot be resolved under existing precedents." Therefore, the Bureau was not required to refer it to the Commission *en banc*.¹⁶ In any event, this argument is moot in light of our affirmation of the Bureau's decision in this *Memorandum Opinion and Order*.

7. *Applicable waiver standard:* We further reject Delta's assertion that the Bureau applied the incorrect standard in evaluating Delta's waiver request. Delta argues the correct standard is that found in Section 1.925(b)(3) of our Rules.¹⁷ However, that rule appears in Subpart F of Part 1 of the Rules – Wireless Telecommunications Services Applications and Proceedings – and thus is limited to wireless proceedings.¹⁸ Further, the material provisions of the standard applied by the Bureau are virtually identical to those found in Section 1.925(b)(3).¹⁹ In this case, as detailed below, the Bureau correctly determined that Delta had failed to demonstrate that special circumstances warranted deviation from the final payment rule, or that the public interest would be served by waiving Delta's final payment deadline.²⁰

¹⁴ Application for Review at 5.

¹⁵ 17 FCC Rcd 6126 (2002) ("*Winstar*").

¹⁶ See 47 C.F.R. § 0.283 (Chief, Media Bureau, has delegated authority to perform all functions of the Bureau described in 47 C.F.R. § 0.61, including waiver requests; a "novel question of law, fact or policy" is required to be referred to the Commission *en banc*). See also *Hawaiian Telephone Co. v. F.C.C.*, 589 F.2d 647, 654 n.13 (D.C. Cir. 1978) (court disagreed with appellants' contention that waiver grant by Common Carrier Bureau went beyond delegated authority, based on lack of novel questions of fact, law, or policy).

¹⁷ 47 C.F.R. § 1.925(b)(3). See Application for Review at 6.

¹⁸ We note also that waiver requests under Section 1.925 "must be filed on FCC Form 601, 603, or 605," and must be accompanied by a \$145.00 fee. 47 C.F.R. §§ 1.925(a), 1.925(b), 1.1102. Delta did not file its waiver request on one of those forms, nor did it pay a fee.

¹⁹ The Media Bureau has no rules-based waiver standard corresponding to 47 C.F.R. § 1.925. Section 1.3 of the Rules (47 C.F.R. § 1.3), under Part 1 – Practice and Procedure, states that rule provisions may be waived "for good cause shown," and 47 C.F.R. § 73.3566(a), under Part 73 – Radio Broadcast Services, Subpart H – Rules Applicable to All Broadcast Stations, provides that requests for waiver "shall show the nature of the waiver or exception desired and shall set forth the reasons in support thereof." The specific waiver standard to be used by the Media Bureau, however, utilizes a case-by-case analysis governed by decisional precedent. See *Northeast Cellular Telephone Co. v. F.C.C.*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) ("*Northeast Cellular*") ("[A] waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest," citing *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969) ("*WAIT Radio*"). See also *BellSouth Corp. v. F.C.C.*, 162 F.3d 1215, 1225 n.10 (D.C. Cir. 1999) (Wireless Telecommunications Bureau utilized broadband PCS waiver standard in [then] 47 C.F.R. § 24.819(a)(1); contention that this was the wrong standard was "of no moment" because of the "virtual identity" of that rule and the correct, *WAIT Radio* standard. The 47 C.F.R. § 1.925(b)(3) waiver standard is substantially similar to that in former Section 24.819(a)(1)).

²⁰ See *Northeast Cellular* and *WAIT Radio*, *supra* note 19.

8. We also disagree with Delta's assertion that the standard imposes an insurmountable burden on applicants. Delta specifically disputes the Bureau's finding that Delta must "maintain sufficient resources" to pay for the Greenville construction permit.²¹ It argues that this is tantamount to "requiring each and every highest bidder in an auction proceeding to horde (sic) an amount of cash equal to its bid in a fire-proof vault until the day . . . when the applicant will suddenly be asked to submit such amount to the FCC."²² We ensure the financial qualifications of winning bidders by requiring timely auction payments.²³ Bidders must account for possible fluctuations in the economy when making financial arrangements for payment obligations and formulating bidding strategies. We do not concern ourselves with the means by which a bidder ensures the availability of sufficient resources to meet its payment obligations. We are concerned only that timely auction payments are made. A bidder's failure to take the steps necessary to allow such payments does not justify a waiver of established payment deadlines.²⁴

9. *Combination of factors underlying waiver request:* Delta argues that the Bureau's primary error was in addressing the individual factors underlying its waiver request, rather than "*the combined effect* of at least five compelling factors."²⁵ Additionally, Delta contends the Bureau erroneously interpreted Delta's argument, focusing solely on Delta's contention that the proceeding's lack of finality justified waiver. Instead, Delta insists it has consistently maintained that waiver is appropriate due to the lack of finality "*coupled with other intervening events*."²⁶ We find, however, that none of the five factors listed by Delta²⁷ is sufficiently compelling, either singly or in combination, to justify the requested final payment waiver. We examine each below.

10. Lack of finality: Delta contends that the pending application for review of the Bureau's denial of MBN's petition to deny justifies waiver, in part because lending institutions are reluctant to provide financing when an application grant is subject to pending review. However, this argument was rejected in both *Abundant Life III*, in which the winning bidder faced a pending court appeal of the Commission's *Memorandum Opinion and Order*, and in *Winstar*, in which an application for review was

²¹ Staff Decision at 4.

²² Application for Review at 5-6.

²³ See *Abundant Life, Inc.*, 16 FCC Rcd 4972, 4973-74 (2001); *Minnesota Christian Broadcasters, Inc.*, 18 FCC Rcd 614, 619-20 (2003). See also *BDPCS, Inc.*, 12 FCC Rcd 3230, 3235 (1997), *recon. denied in part and granted in part*, 12 FCC Rcd 15341 (1997) ("*BDPCS*") ("[I]n order to maintain the integrity of the auction process, and to ensure the efficient provision of services to the public, auction participants are held to certain obligations, such as meeting relevant financial deadlines."); *Mountain Solutions LTD, Inc.*, 13 FCC Rcd 21983, 21993 (1997), *review denied in part and dismissed in part*, *Mountain Solutions LTD, Inc. v. F.C.C.*, 197 F.3d 512 (D.C. Cir. 1999) ("*The purpose of the second down payment rule is to ensure the financial viability of a license winner and to provide an indication as to the capability of the winning bidder to actually build out its system.*" (emphasis in original)).

²⁴ We reject the suggestion that Delta's "track record of constructing and operating stations assures the Commission that Delta will follow through" with payment of its auction bid and construction of the Greenville station. Application for Review at 7. One fact has no bearing on the other. As discussed in the text, we presume that serious, financially qualified bidders meet their auction payment obligations in a timely manner. Delta's past performance thus has no relevance to our evaluation of its current financial qualifications.

²⁵ Application for Review at 8 (emphasis in original).

²⁶ *Id.* at 13 (emphasis in original).

²⁷ *Id.* at 8.

pending before the Commission. We have determined that, under Section 73.5006(d) of our Rules, after the staff has denied any petitions to deny, timely final payments must be made notwithstanding any pending review or appeals.²⁸ As discussed in more detail below,²⁹ the reasons underlying our auctions payment policies were thoroughly examined and explained in *Abundant Life III*, most importantly the need for winning bidders to demonstrate their financial qualifications. Nothing Delta has presented persuades us to strike a different balance between certainty and payment.

11. Uncertainty created by Commission's alleged failure promptly to act on MBN's application for review:³⁰ As discussed in the preceding paragraph, the rules require the staff to demand final payment for the Greenville construction permit, notwithstanding that review is pending. The pendency of an appeal under our rules does not constitute "special circumstances," and therefore a waiver in these circumstances is unwarranted. We also note that acting on MBN's application for review would not have ended "uncertainty." MBN could still have sought judicial review. This, indeed, was the fact situation in *Abundant Life III* and, as discussed above, we denied the auction winner's payment waiver request in that case. In short, Delta requests that we act on applications for review before requiring payment, rather than demanding payment after acting on any petitions to deny. We do not agree, and believe that the line we have drawn is both well within our discretion and amply justified.

12. Economic effects of September 11: Delta argues that the "unique and unforeseeable effects, including an economic downturn, triggered by the shocking September 11, 2001, terrorist attacks" justify the requested waiver.³¹ We disagree. We reject the contention that changes in economic conditions – whether based on foreseeable or unforeseeable events – justify a waiver of our auction payment requirements. The integrity of our bidding process requires the certain and strict application of our auction rules. This approach ensures the *bona fides* of each bidder, and promotes an efficient and fair competitive bidding process. While the particular economic downturn of which Delta complains was arguably precipitated in part by the events of September 11, 2001, we are not persuaded that the Commission should – in essence – selectively waive its financial qualifications requirement when it is alleged that such circumstances contribute to a winning bidder's failure to make timely auction payments. At all times during the auction process, Delta was obliged to take whatever steps were necessary to ensure it could make its payments regardless of the state of the economy.³² Delta's inability to make its final

²⁸ See *supra* note 7.

²⁹ See *infra* para. 19.

³⁰ This description of the second factor is listed at page 8 of the Application for Review. However, at page 9, Delta lists the second factor as "FCC Jurisdiction," stating that while the Commission in *Winstar* denied waiver of the final payment deadline when Commission review of a petition to deny was pending, it did not decide whether pending review "coupled with other compelling factors" might justify a waiver. This merely restates Delta's overarching "combination of factors" argument, rather than setting forth an individual factor for consideration. Accordingly, we address the second factor as listed at page 8 of the Application for Review, which is identical to the fourth listed factor, and we will not separately address the fourth listed factor.

³¹ Application for Review at 8.

³² See *BDPCS*, 12 FCC Rcd at 3235 ("We also have stated that inherent in this responsibility placed upon auction participants is the notion that the Commission cannot take into account the 'private business arrangements that an applicant has made to finance its successful bid,'" citing *Requests for Waivers in the First Auction of 594 Interactive and Video Data Service Licenses*, 9 FCC Rcd 6384, 6385 (1994)). Cf. *Zephyr Broadcasting*, 11 FCC Rcd 19627, 19630 (1996) ("*Zephyr Broadcasting*") ("The Commission has repeatedly held that the unavailability of funds is not considered a circumstance 'beyond the control' of a permittee and does not, therefore, justify extension of a construction permit.").

payment is based on its business decision to rely on the proceeds of a loan secured by an inherently volatile asset, *i.e.*, Delta's principals' stock portfolios.³³ The failure of this business plan does not warrant waiver of our payment rules. Moreover, were we to waive or defer auction payment obligations because of a poor economy, we would in effect be treating winning auction bidders differently based on the timing of their payment obligations relative to the economic climate, or the different financial plans on which they rely to fund payment of their auction bids.³⁴

13. Presence of all factors at time Commission requested final payment: Delta argues that the Bureau "chose to release the Public Notice triggering Delta's payment obligation at the worst possible moment,"³⁵ *i.e.*, "when all of the preceding factors coincided."³⁶ However, the Bureau's release of the Final Payment Public Notice was dictated by Commission action. In order to give full effect to our auction payment policies, in *Abundant Life III* we directed the staff to issue public notices announcing that construction permits are ready for grant promptly after dismissing or denying petitions to deny, rather than waiting until Commission review was complete.³⁷ This is in keeping with the Congressional objective of rapidly deploying new services for the benefit of the public without administrative or judicial delays.³⁸ *Abundant Life III* was released February 25, 2002, and the Final Payment Public Notice was released March 7, 2002, less than two weeks later. Thus, the Bureau's action effectuated a Commission policy that applies equally to all broadcast auction participants.

14. Delta attempts to analogize its situation to that in *Anchor Broadcasting Limited Partnership*.³⁹ There, winning bidder Anchor faced an appeal of the general auction procedures as

³³ See Application for Review at 9-10.

³⁴ See, *e.g.*, *Requests for Extension of the Commission's Initial Non-Delinquency Period for C and F Block Installment Payments*, 13 FCC Rcd 22071, 22072 (1998) ("The challenge of raising capital to finance . . . licenses exists in varying degrees for all licensees and does not constitute 'unique facts and circumstances.'"), *petition for recon. denied*, 14 FCC Rcd 6080, *aff'd sub nom*, *SouthEast Telephone v. F.C.C.*, No. 99-1164, 1999 WL 1215855 (D.C. Cir. Nov. 24, 1999). Cf. *Zephyr Broadcasting*, 11 FCC Rcd at 19630 (Commission has not treated "prevailing economic conditions" as a factor beyond the control of a permittee justifying extension of construction deadline under former 47 C.F.R. § 73.3534(b)).

It is true that the Commission cited concerns about the economic downturn and its effect on the telecommunications sector in *Disposition of Down Payment and Pending Applications By Certain Winning Bidders in Auction No. 35*, 17 FCC Rcd 23354, 23358 (2002). However, that case is readily distinguishable. There, the winners of licenses previously licensed to NextWave Power Partners, Inc. and Urban Comm – North Carolina, Inc. had substantial down payments on deposit with the Commission. Due to the uncertainty surrounding those contested licenses, the Commission allowed winning Auction No. 35 bidders to withdraw their long-form applications and obtain deposit refunds. The situation there involved winning bidders who stood ready to make their final payments, but whose licenses could not be awarded due to a Supreme Court challenge by the previous licensees. Here, on the other hand, there is no such challenge by a prior licensee, and the Bureau stood ready to award the Greenville construction permit to Delta, but for Delta's failure to make its final payment.

³⁵ Application for Review at 11.

³⁶ *Id.* at 8.

³⁷ See *supra* note 7.

³⁸ See 47 U.S.C. § 309(j)(3)(A).

³⁹ *Letter to Anchor Broadcasting Limited Partnership and Galaxy Communications, Inc.*, Ref. No. 1800B3-TSN (MMB Mar. 9, 2000), *recon. denied*, *Letter to Anchor Broadcasting Limited Partnership and Galaxy Communications, Inc.*, Ref. No. 1800B3-TSN (MMB May 23, 2000), *application for review dismissed as moot*, *Anchor Broadcasting Limited Partnership*, 16 FCC Rcd 8167 (2001) ("Anchor Broadcasting").

applied to a long-standing comparative proceeding, rather than a direct attack on its application. Additionally, unlike in this case, Anchor applied for waiver of final payment *before* the Bureau listed its application on a final payment public notice.⁴⁰ We concluded in *Abundant Life III* that *Anchor Broadcasting* supports our auction payment policy: final payment must be made after the public notice required by Sections 1.2109(a) and 73.5003(c), without regard to whether subsequent Commission or court action might set aside the results of the auction.⁴¹

15. We also reject Delta's argument that the structure of Section 0.459 of our Rules,⁴² regarding requests for document confidentiality, supports its contention that we must examine the "interlocking factors" of "finality and financial hardship."⁴³ Section 0.459 sets forth factors to be considered in evaluating a request by a party that the Commission keep confidential any documents the party submits.⁴⁴ The rule also provides that information covered by such a request be kept confidential "until the Commission acts on the confidentiality request and all subsequent appeal and stay proceedings have been exhausted."⁴⁵ However, the very nature of a confidentiality request distinguishes Section 0.459 from our auction rules. Once a confidential document's contents are revealed, the harm is irreparable. Delta fails to show how it suffers irreparable harm by being required to make its final auction payment before all reviews and appeals are final. In the event that a challenge were ultimately successful, Delta would be entitled to refund of its payments in accordance with established procedures.⁴⁶ Delta's attempt to analogize Section 0.459 thus fails.

16. Finally, Delta's "combination of factors" argument is most effectively refuted upon examination of the two other winning bidders listed in the Final Payment Public Notice. As of the Final Payment Public Notice release date, all three – Delta, MCBI, and NABC – faced applications for review of denials of petitions to deny their applications; all three were required to make payment decisions based on non-final grants of their respective applications; all three had to contend with the same economic climate; and all three faced the same final payment deadline, which occurred when all the aforementioned factors were in effect. Despite this, however, both MCBI and NABC timely made their final payments and were issued construction permits.⁴⁷ This suggests that the combination of factors referenced by Delta

⁴⁰ 17 FCC Rcd at 4010.

⁴¹ *Id.*

⁴² 47 C.F.R. § 0.459.

⁴³ Application for Review at 13.

⁴⁴ 47 C.F.R. § 0.459(b).

⁴⁵ *Id.* § 0.459(d).

⁴⁶ See, e.g., *Public Notice*, "Auction of C, D, E, and F Block Broadband PCS Licenses, Status of Applications to Participate in the Auction, Clarification of Payment Issue Relating to Licenses Subject to Pending Proceedings," 14 FCC Rcd 5467, 5470 (1999) (Commission will return all payments made by winning bidders forced to surrender their licenses as a result of final determinations reached in pending judicial proceedings). See also *Implementation of Section 309(j) of the Communications Act – Comparative Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, Reexamination of the Policy Statement on Comparative Broadcast Hearings, Proposals to Reform Comparative Hearing Process to Expedite the Resolution of Cases*, 14 FCC Rcd 16511, 16516 (1999). However, to the extent a winning bidder is ultimately found disqualified to be a licensee, any refund would be reduced by the default payment set forth in 47 C.F.R. § 1.2104(g)(1) and (2).

⁴⁷ MCBI's permit, File No. BPH-19950601MA, was granted March 21, 2002. NABC's permit, File No. BPH-19960111MX, was granted March 26, 2002.

did not preclude timely payment. Delta has not shown that its circumstances are so distinct as to warrant different treatment from that afforded to similarly situated applicants such as MCBI and NABC.⁴⁸

17. In summary, none of the four factors set forth by Delta is sufficiently “compelling” to justify a waiver of the final payment rule. Further, when we have waived rules based on a combination of factors, there was some underlying merit to some or all of those factors.⁴⁹ We do not find that to be the case here. We conclude that the combination of factors outlined by Delta does not justify waiving its final payment obligation.

18. *MMTC Comments*: MMTC, in its Comments on Delta’s Application for Review, requests we set aside what it labels the “*Abundant Life* policy,” wherein we require payment in full of winning auction bids after staff dismissal or denial of petitions to deny, often before Commission and/or court reviews are complete.⁵⁰ MMTC sets forth three reasons for its position. First, it argues the policy is inconsistent with “the Commission’s longstanding policy of tolling procedural dates for building out nonfinal construction permits.”⁵¹ Second, it contends that the policy undermines the Congressionally mandated requirement that we promote opportunities for small businesses.⁵² Finally, MMTC states that the policy “almost ensures” that losing bidders will tie up the winners with petitions to deny, designed merely to interfere with the winning bidders’ financing.⁵³

19. We decline to set aside our policy as MMTC requests. First, our policy regarding auction payments was thoroughly examined and discussed in *Abundant Life III* and other authorities cited therein.⁵⁴ As we stated in *Abundant Life III*, one of the primary objectives of our auction rules is to ensure that only serious, financially qualified applicants receive licenses and construction permits.⁵⁵ Timely auction payments are the principal way we determine whether a winning bidder is financially

⁴⁸ See *Melody Music, Inc. v. F.C.C.*, 345 F.2d 730, 732 (D.C. Cir. 1965) (“*Melody Music*”) (Commission must explain reasons for treating similarly situated applicants differently).

⁴⁹ See, e.g., *Acadian Ambulance Services, Inc.*, 14 FCC Rcd 19310, 19313-14 (1999) (fact that applicant’s paging frequency used largely for purposes related to provision of emergency medical services, coupled with extension of paging system into sparsely populated areas, justified waiver of freeze on new paging applications); *Cable TV Systems, Inc. Bethany, Missouri*, 69 F.C.C.2d 1512, 1515-16 (1978) (fluctuation of subscriber count above and below 1,000, while not itself justifying a waiver of cable program nonduplication rule, justified waiver in combination with factors such as fact that only small part of community was within 55-mile zone of protection, number of subscribers will likely remain at or near 1,000, and cost of nonduplication switching equipment) .

⁵⁰ While late-filed *amicus* briefs are generally not appropriate in adjudicatory proceedings, we may consider them when they address broad policy issues. See *Heritage Cablevision Associates of Dallas, L.P.*, 6 FCC Rcd 7099, 7101 n.13 (1991). We will also consider MMTC’s comments despite its failure to request leave to file an *amicus curiae* brief. See, e.g., *Mobilemedia Corporation*, 12 FCC Rcd 7927, 7930 (1997).

⁵¹ MMTC Comments at 3.

⁵² *Id.* at 5.

⁵³ *Id.* at 6-7.

⁵⁴ *Abundant Life III*, 17 FCC Rcd at 4008-09.

⁵⁵ *Id.* at 4008. See also *Broadcast First Report and Order*, 13 FCC Rcd at 15956, 15989; *BDPCS*, 12 FCC Rcd at 3235.

qualified to build out the permit being auctioned, notwithstanding that the bidder's construction period may be tolled by pending administrative or judicial proceedings.⁵⁶

20. As for MMTC's second contention, the Commission has determined that, in the broadcast auctions context, providing a new entrant bidding credit was the method by which it would fulfill its obligations under Section 309(j) of the Communications Act of 1934,⁵⁷ to promote economic opportunity and competition for designated entities.⁵⁸ Thus, we provide bidding credits to winning bidders with no or few mass media interests, many of which are small businesses. Having provided a means by which a qualified entity may use a bidding credit to lower the cost of its winning bid, we decline to adopt MMTC's proposal to allow certain small business winning bidders to delay their auction payments, and thus their affirmation of financial qualifications.⁵⁹

21. Finally, our experience with broadcast auctions to date has shown that only a small number of petitions to deny have been filed against winning bidders' post-auction long form applications.⁶⁰ Further, there is no evidence that these petitions have been filed for the reasons MMTC suggests, *i.e.*, merely to interfere with the winners' financing and force them to default on their auction payments. While we would certainly revisit our procedures if it appeared they were being misused to disadvantage certain auction participants, MMTC presents no evidence to support its speculative concerns.⁶¹

22. *Delta's Petition for Reconsideration:* Delta filed a November 1, 2002, Petition for Reconsideration of the October Letter setting forth the amount of Delta's default payment,⁶² seeking rescission of the penalty assessment. Delta presents three issues: (1) that a default payment should not be assessed before "Commission-level finality attaches to revocation of its status as the highest bidder"; (2)

⁵⁶ 47 C.F.R. § 73.3598(b)(ii).

⁵⁷ 47 U.S.C. § 309(j)(3)(B).

⁵⁸ *Broadcast First Report and Order*, 13 FCC Rcd at 15993. Congress directed us, in prescribing regulations for competitive bidding, to promote economic opportunity for a wide variety of applicants, "including small businesses, rural telephone companies, and businesses owned by members of minority groups and women." 47 U.S.C. § 309(j)(4)(C).

⁵⁹ *Accord Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 397-98 (1997) ("*Competitive Bidding Third Report and Order*") (Commission eliminated installment payments for future auctions as a means of financing small business participation in auction programs; experience showed that installment payments may not be necessary to ensure meaningful opportunity for small businesses to participate in auctions, and obligating licensees to pay for licenses as a condition of receipt requires greater financial accountability from applicants, thus serving the public interest objectives of 47 U.S.C. § 309(j)).

⁶⁰ In Closed Broadcast Auction No. 25, for example, only 14 petitions to deny or informal objections were filed against the 94 long-form applications filed by winning bidders.

⁶¹ Our Rules prohibit filing frivolous petitions to deny. See 47 C.F.R. § 1.52. Further, it is Commission policy to investigate legitimate claims of abuse of process, and to take appropriate enforcement action when warranted. See, *e.g.*, *Public Notice*, "Commission Takes Tough Measures Against Frivolous Pleadings," 11 FCC Rcd 3030 (1996). See also *ConQuest Operator Services Corp.*, 14 FCC Rcd 12518, 12523-24 and n.32 (1999) (parties "are under the obligation to be truthful and forthright in their written submissions.").

⁶² See *supra* note 3.

that the Commission had not yet decided whether the combination of factors Delta presented in its Application for Review justified waiver of the default payment rules; and (3) that the Commission should be estopped from assessing a default payment owing to its “contributory role in preventing Delta from acquiring the capital to fund its high bid.”⁶³

23. We reject Delta’s contention that the October Letter constituted an “additional penalty,”⁶⁴ and thus find the Petition for Reconsideration to be redundant. A winning bidder that fails timely to remit the balance of its bid is deemed to have defaulted by operation of our rules,⁶⁵ and defaulting bidders are subject to the payments set forth in Section 1.2104(g).⁶⁶ The default payment has two components: the difference between the defaulted winning bid and the subsequent winning bid,⁶⁷ and a payment equal to 3 percent of the defaulted winning bid or the subsequent winning bid, whichever is less.⁶⁸ The payment set forth in the October Letter was thus an integral part of our auction default procedures, not an additional penalty. Delta does not challenge the amount of the default payment assessed. Rather, relying primarily on the arguments presented in its Application for Review, Delta challenges the fact that it was found in default at all, arguing that these same factors justify waiver of the so-called additional penalty. Thus, in the interest of administrative efficiency, we consolidate the Petition for Reconsideration with the Application for Review.

24. Delta presents no authority for its proposition that the Bureau may not assess the default payment “unless and until Delta’s status is determined with finality.”⁶⁹ Under the Commission’s rules, a bidder who fails to remit the required down or final payment for a license for which it was the high bidder is subject to a default payment.⁷⁰ Typically, when a winning bidder defaults and the permit is to be re-auctioned, the staff will assess an initial default payment of three percent of the defaulted bid, with the full and actual default payment to be calculated after re-auction.⁷¹ Thus, our auction procedures permit the staff to assess part of the default payment before Commission review is concluded. For Closed Broadcast Auction No. 25, however, because Congress “expressly restricted participation in any auction of the mutually exclusive applications subject to Section 309(l) to the pending pre-July 1st applicants,” in the event of a winning bidder’s default the Commission decided to offer the permits to the other highest

⁶³ Petition for Reconsideration at 3. MBN filed a November 19, 2002, Motion to Strike the Petition for Reconsideration, arguing that the October 2 staff decision was “interlocutory,” and thus not appropriate for reconsideration under 47 C.F.R. § 1.106(a)(1). Motion to Strike at 2. The October 2 staff decision was not “interlocutory.” Our Rules require not only that a defaulting winning bidder’s application be dismissed, but also that the defaulter be assessed a penalty. 47 C.F.R. §§ 1.2104(g)(2), 1.2109(c). Thus, both the Staff Decision and the October 2 letter, taken together, represent the Bureau’s following the default procedures set forth in our Rules. The motion to strike will therefore be denied.

⁶⁴ Opposition to Motion to Strike at 2.

⁶⁵ 47 C.F.R. § 1.2109(c).

⁶⁶ *Id.* § 1.2104(g).

⁶⁷ 47 C.F.R. § 1.2104(g)(1).

⁶⁸ *Id.* § 1.2104(g)(2).

⁶⁹ Petition for Reconsideration at 4.

⁷⁰ 47 C.F.R. §§ 1.2104(g)(2), 1.2109(c).

⁷¹ *Competitive Bidding Third Report and Order*, 13 FCC Rcd at 434. See also, e.g., *Grand Connectivity, L.L.C.*, 14 FCC Rcd 13943, 13946-48 (WTB 1999).

bidders at their final bids rather than re-auction them.⁷² In the Staff Decision the Bureau offered the Greenville construction permit to second-highest bidder MBN at its final net bid amount. Because MBN accepted the offer by timely depositing its 20 percent down payment,⁷³ the Bureau was able immediately to calculate Delta's full default payment based on MBN's final net bid and did so.

25. As for the "combination of factors" Delta contends justifies waiver of the default penalty, this has been addressed above. Finally, as for Delta's estoppel argument, this too has been discussed at paragraphs 13 – 15 above. We reiterate that, contrary to Delta's contention in the Petition for Reconsideration, we are not "treating similarly situated applicants differently."⁷⁴ Delta erroneously compares itself to the *Anchor Broadcasting* applicant which, significantly, had not been placed on a final payment public notice.⁷⁵ In fact, as noted above, the "similarly situated" applicants are MCB and NABC. These winning bidders shared the same procedural posture as Delta, and made timely final payments. Were we to grant the relief Delta requests on the facts presented, it is they who might justifiably complain of dissimilar treatment.⁷⁶

26. *MBN's June 16, 2000, Application for Review*: Because we affirm the dismissal of Delta's application, MBN's June 16, 2000, application for review is now moot. Accordingly, we will dismiss that Application for Review.

27. **Conclusion / Ordering Clauses.** Delta's Application for Review IS DENIED. Delta's Petition for Reconsideration of the Bureau's October 2, 2002, staff decision IS DENIED, and MBN's Motion to Strike the Petition for Reconsideration IS DENIED. MBN's June 16, 2000, Application for Review IS DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁷² *Broadcast First Report and Order*, 13 FCC Rcd at 15952.

⁷³ October Letter, 17 FCC Rcd at 19030.

⁷⁴ Petition for Reconsideration at 5.

⁷⁵ See discussion at para. 14 of the text.

⁷⁶ See *Melody Music*, *supra* note 48.